No. 4362

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JOHN EARL and JOHN JOHNSON,
Plaintiffs-in-Error,

vs.

UNITED STATES OF AMERICA,
Defendant-in-Error.

PETITION FOR REHEARING.

Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

J. L. FINCH,
Attorney for Plaintiffs in Error.
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Seattle, King County, Washington.

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Come now the plaintiffs in error and respectfully petition this honorable court to grant them a rehearing upon the writ of error herein.

1. The decision of the court has gone off upon a point not presented in the lower court, nor in argument to this court, nor in anywise in issue in the case. Your honors hold that a search warrant was unnecessary in view of the facts appearing upon the record, and for that reason, and for that alone, have affirmed the judgment of the lower court. Such holding under the circumstances of this case appeals to the writer as unjust, also as unwarranted in law.

It seems unjust, because the plaintiffs in error have never had a hearing upon the point. What might have been the facts had the question been an issue at the trial this court has no way of knowing. The plaintiffs in error, defendants below, made timely a motion to suppress the evidence obtained by an illegal search and seizure. The lower court denied the motion. That it was in error in so doing this court affirms in saying in its opinion "* * * but the sustaining affidavit for the warrant was insufficient to justify its issuance." The de-

fendants and their counsel relied upon this error. We do not mean to intimate that appellants could have successfully defended upon the merits, in any event; but that, because the government had no evidence other than that obtained by the illegal search and seizure, the trial was but perfunctory. The government relied upon such evidence, and poured it in. It did not claim that there were any circumstances making a search warrant unnecessary, nor offer any evidence to that effect. Such evidence as your honors have called attention to came out incidentally in introducing, and as part of, the illegal evidence. No one marked it at the time. The Government made no point of it; neither did counsel for the defendants see any point or harm in it. Nor was there any harm in it, for there was no issue framed making it germane to any thing but the merits of guilt or innocence. Had the lower court sustained the motion to suppress, and reserved the right to determine upon the trial whether a search warrant was necessary or not, then the defendants would have been on guard and would have gone into the matter fully, and the record would furnish this court with *all the facts*. But the record

shows the contrary. The defendants below, at the time of the trial, by renewing their point made in their motion, thus called their position to the attention of court and counsel. Even then neither court nor counsel advised defendants that a search without a search warrant was a question before the court. On the contrary the Government specifically showed that the entrance was made by *virtue of the warrant* (See Transcript, page 44), and relied upon such entry. They continued so to rely, even to oral argument in this court.

This court has the right to determine a case upon a theory other than that advanced by either counsel, to be sure. But it ought to be upon facts in issue, so that the evidence upon both sides is presented as fully as counsel sees fit. In this case, as reasons for decision, the court stresses three points—(1) that the car came from the north, whence the usual source of liquor in Seattle; (2) that it was mud covered; (3) that it was heavily

laden. But had these matters been in issue we could easily have shown, (1) that at the particular point in the city where this liquor was seized there is no significance in the direction whence the car came—that the topography of the city at this point is such that even the grocery delivery cars come from that direction; (2) that not alone was this car covered with mud—that every car in the city of Seattle was so decorated at that time; that to cover Seattle cars with mud is the only known reason for our excessive rains at the period of the year when this car was seized (December 28); (3) that the car was not excessively laden—that the weight of the liquor it conveyed at the time did not exceed the weight of the passengers it was built to carry, and hence the "heaven laden" feature could have no significance.

Had the points this court stresses been made by the Government even as late as upon oral argument, so that the plaintiffs in error had had even that opportunity to meet it, we would feel better contented, for we feel that had we had a chance to call your honors' attention to the facts just stated, the court would not have attached so much import-

ance to the matters mentioned in its opinion. But for the court to determine the cause against the plaintiffs in error upon a point not tried out, nor in issue, and regarding which they had no notice putting them upon guard so that negligence might be laid against them for failure to go further into the matter, seems to the writer to be unjust.

In addition to what we have said upon the injustice of the holding, it seems to us that the law supports us. We believe that it is not within the province of the court to consider what would be the law if the facts were different than the record discloses. That is to say, the entry having been made by virtue of the search warrant, all parties concerned, the Government, the defendants, and the courts, are bound by it; and all are precluded from speculating upon what would be the law had the circumstances been different.

The Government agents entered closed and locked doors, by virtue of the search warrant (Transcrip, page 44); they searched and seized by virtue of the warrant (same page), and they made return of the warrant to that effect. At page 13 of the record they say:

"Return of Search Warrant:

Returned this 29th day of Jan. A. D. 1924.

Served, and search made as within directed, upon which search I found:

23 Cases and 6 1/5 gals. of Whisy and Gin.
1 Dodge Tour. Auto.
1 Key and lock.
Papers."

and duly inventoried the same as above, according to law.

(Signed) GORDON B. O'HARA.

I, Gordon B. O'Hara, the officer by whom this warrant was executed, do swear that the above inventory contains a true and detailed account of the property taken by me on the warrant.

(Signed) GORDON B. O'HARA.

Subscribed and sworn to before me this 29th day of Jan., 1924.

.....
United States Commissioner."

An officer is bound by his return.
17 R. C. L., *"Levy and Seizure,"* pp. 231-2-3, Secs. 128, 129.
21 R. C. L., *"Process,"* pp. 1315, 1321, Secs. 62 to 70.

33 C. J., *"Intoxicating Liquors,"* p. 683, Sec. 384.

State vs. District Court, 224 Pac. 866, at 869, 870.

A state cannot contradict the return of its officer. 67 Me. 558.

Courts, too, are bound by the return.

U. S. vs. Murby, 293 Fed. 849.

U. S. vs. Casino, 286 Fed. 976, 978.

2. Upon the second point deciding that possession and transportation or liquors are distinct offences and that the law penalizes both, we have no quarrel with the court's statement of the law. But we feel that we failed to impress the court with the peculiar facts of this case, which, had we made them clearly understood, would have called for a particular application of the law to particular facts. That is to say, the possession and transportation *in this case* were so bound together that the Government could not show the one without showing the other. Your honors say "evidence to prove possession would not be sufficient to sustain the charge of transportation." That is true, as an abstract statement of the law. But applied to this case it is not accurate. The Government could not show possession in this case without showing transportation, and vice versa. All there was to the facts of

this case was that the Government agents found the liquor in the car which they saw enter the garage—transportation and possession combined, and the Government could not have related the facts about one charge without showing the other. Under those circumstances we feel that the defendants have been doubly punished. In addition to the cases cited in our brief, we add,

Raine vs. U. S., 299 Fed. 407, decided by this court.

Miller vs. U. S. 200 Fed. 529 (C. C. A. 6 Cir.).

In the *Raine* case this court noted the point we are urging here, though it was not assigned and was first called into question by counsel upon appeal. The court did not pass upon the point because the record was incomplete and failed to show the facts fully, but from what your honors did say we conclude that the point is deemed well taken whenever facts present a case for its application.

The *Miller* case presents our argument perhaps more clearly than we are able to, and we respectfully urge its consideration.

Appellants believe they have substantial cause to complain of the rulings of the lower court, and

that this court has failed to meet the questions presented by the record. We have tried to impress upon your honors wherein we feel aggrieved, and respectfully urge a reconsideration of the case.

Respectfully submitted,

J. L. FINCH,

Attorney for Plaintiffs in Error.